Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1151

ROBERT D. JACKSON and JOHN HARDY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

EDWARD G. MAAG
4343 West Main Street
Belleville, Illinois 62223
Counsel for Petitioner, Robert D. Jackson

MICHAEL B. CONSTANCE
#8 East Washington Street
Belleville, Illinois 62220
Counsel for Petitioner, John Hardy

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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vs.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Robert D. Jackson and John Hardy, petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 30, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on Pages A-1 through A-5. The Opinion of the Court of Appeals affirmed the conviction of Robert D. Jackson. The petitioners had been tried by jury trial in the United States District Court for the Eastern District of Illinois, the Honor-

able James L. Foreman, Judge presiding, and were found guilty. The Court denied defendant's post-trial motions, imposed sentence upon the defendant and entered judgment of conviction against the defendant.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 30, 1977. A Petition for Rehearing by the Full Panel was filed on December 14, 1977 and denied by the United States Court of Appeals on January 5, 1978. Jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTION PRESENTED

Did the court below err in affirming the District Court's judgment of conviction of petitioner by ruling that the testimony of FBI Agent Jones was admissible as substantive evidence against petitioner, such testimony being of extra judicial pre-trial conversations with defendant, Hardy, where no conspiracy was charged; and the failure of the court to give appropriate cautionary instructions as well as the admission of documents through the Agent's testimony as business records although never identified as such by any witness.

STATUTE INVOLVED

The statute involved is Title 18, United States Code, Section 1951 which states as follows:

"§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793."

and Title 18, United States Code, Section 1623 which states as follows:

"§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contra-

dictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

STATEMENT OF THE CASE

This case arose from the return of a five count indictment against the petitioners, it was tried to a jury before the Honorable James L. Foreman and a verdict of guilty was returned against both petitioners to Count I (18 USC, Section 1951); and against petitioner, Hardy, on Count V (18 USC, Section 1623). No conspiracy was charged.

Government's informant and chief witness, Robert Calhoun, testified that petitioner, Jackson requested him to contact Cunliff Construction Company to see if they would undertake construction of the Cahokia Swimming Pool and Skating Rink at the same figure accepted by the Village of Cahokia from Camel Development, the low bidder who could not get proper bonding.

Calhoun testified that Jackson told him he wanted the job clean and straight ". . . but if at a future time—if anything could be worked out, we would talk about it."

Cunliff was awarded the job and subsequently obtained pumps on a rental basis from Distributor Supply, Inc. operated by petitioner, Hardy.

It was the Government's contention that invoices from Distributor Supply, Inc. were phony, that the company was in fact a "sham" which did not keep proper records; and that the payments made to it were in fact kickbacks, a part of which monies were received by petitioner, Jackson.

Informant Calhoun testified before the Grand Jury that pumps were never used on the job, but later changed this testimony at the time of trial.

Calhoun was characterized both by the Government and the Appellate Court as ". . . a demonstrated thief, liar and double dealer . . .".

During the course of the Government's case, FBI Agent Donald Jones was called and testified to exhibits he took into his possession from the petitioner, Hardy, after Hardy was served with a Grand Jury subpoena. Agent Jones further testified with regard to extra judicial conversations he had with petitioner, Hardy.

Government Exhibit No. 1 was among these documents which was never specifically shown to petitioner, Hardy, during his Grand Jury testimony upon which his prosecution under Count V of the indictment and his eventual conviction was based.

REASONS FOR GRANTING THE WRIT

Now come the petitioners Robert Jackson and John Hardy by and through their attorneys, and respectfully and most earnestly and sincerely urge that there exists in this cause manifest, overwhelming and compelling reasons for the granting of a writ of certiorari in this cause. The reasons are as follows:

I

Reversible Error Was Committed by the Admission, Over Objection, of the Hearsay Testimony of FBI Agent Jones as Substantive Evidence Against Jackson the Entirety of Jones' Extra Judicial Pre-Trial Conversations With the Defendant, Hardy, and Documentary Exhibits Given to Jones by Hardy.

The trial court permitted an FBI Agent Jones to testify at length as substantive evidence, not by way of impeachment, and in the Government's case in chief, to extra judicial pretrial statements made to the FBI Agent by Jackson's co-defendant, John Hardy, without any cautionary instruction to the jury. FBI Agent Jones' testimony was hearsay as to the defendant, Jackson. Objections to the testimony were made by Jackson's counsel immediately before Jones testified, a multitude of times during his testimony and after his testimony. Counsel for the defendant, Jackson, specifically and repeatedly asked the court for a specific limiting instruction which cautioned the jury to disregard Jones' testimony as to the defendant, Jackson. (Tr. 561 through 619) See also Tr. 1201 and 1202 where counsel for defendant, Jackson, at the conclusion of the court's charge to the jury, again asks for a cautionary instruction with regard to Jones' testimony and this was denied by the court.

The appellate court found no eror in the admission of Jones' recitation of co-defendant, Hardy's extra judicial statements and admissions without cautionary instruction of any kind.

The rule has always been that the admission of extra judicial statements and hearsay declaration of one defendant in a multiple defendant trial without cautionary instruction, both at the time the hearsay is offered as well as at the conclusion of the evidence, is error. *United States v. Brown*, 555 F2d 407 (5th Cir.); *United States v. Gardner*, 347 F2d 405 (7th Cir.).

The case at bar was not a conspiracy case. The conspiracy exception to the hearsay rule was not applicable. The admission of Jones' testimony of his interview with Hardy as substantive evidence not by way of impeachment was hearsay as to the defendant, Jackson. It did not come under any exception to the hearsay rule recognized at common law or under Article VIII of the Federal Rules of Evidence. FBI Agent Jones' testimony, which covered fifty-six pages in length and during which Government's Exhibits 34, 35, 35a, 35b, 35c, 35d, 35e, 35g and 35i and 36 were offered by the Government and received in evidence by the court over the strenuous objections of counsel for the defendant, Jackson, and his repeated request for limiting instruction, *was all hearsay as to the defendant, Jackson,* and was not admissible against him under any of the exceptions of Rule 803 of the Federal Rules of Evidence.

The appellate court did not find this error "so prejudicial as to warrant reversal"; and this, despite the fact that they did find the documentary exhibits introduced by Jones plainly made more probable the existence of a "crucial fact", namely, a fictitious $6,637.08 invoice which, under the Government's theory, was a "kickback payment" to Hardy and Jackson.

The court found the admission into evidence of these records after identification by FBI Agent Jones alone, not to be

erroneous saying the business invoices "it seems clearly fall within the 'business records' exception to the hearsay rule. . . ."

This ruling changes the common law business records rule and ignores the mandate of Rule 803 of the Federal Rules of Evidence. The appellate court in a footnote said: "The records were delivered under subpoena by Hardy." What the order doesn't say is that these records were not subpoenaed at the trial. The records were the records of Distributor Supply, Inc., an Illinois corporation in which the defendant, John Hardy, was the sole shareholder and in which the defendant, Jackson, never was shown to have any interest as a shareholder or otherwise or to have any connection with it. The "subpoena" referred to by the three judge panel was a grand jury subpoena seved by FBI Agent Jones on October 8, 1975, three weeks before the indictment was returned and over three months prior to the trial. There is no authority to support the conclusion that Government's Exhibits 34, 35, 35a, 35b, 35d, 35e, 35f, 35g and 35i and 36 were properly admitted as business records.

These exhibits which formed such a "crucial" part of the Government's case were hearsay as to the defendant, Jackson.

Both at common law and under the Federal Rules of Evidence a recognized exception to the hearsay rule are "records of regularly conducted business activity". The records in the instant case were never offered by the Government as business records under the exception of Rule 803(6) of the Federal Rules of Evidence; and examination of the transcript of FBI Agent Jones' testimony (Tr. 563 thru 619) reveals that these records were identified by Jones as alleging to be the records of Distributor Supply, Inc., a corporation, delivered to Jones by Hardy months prior to trial and concerning which FBI Agent Jones had no knowledge, save and except for the fact of delivery to him by the defendant, Hardy.

These exhibits could never qualify under Rule 803 for the following reasons:

A. FBI Agent Jones was not "the custodian or other qualified witness" as required by Rule 803(6).

B. Neither Jones nor any other witness at the trial testified that the records or the transactions referred to therein were kept "in the course of a regularly conducted business activity" as required by Rule 803(6) of the Federal Rules of Evidence.

C. Neither Jones nor anyone else testified at the trial that it was "the regular practice of that business activity to make" the records tendered as required by Rule 803(6) of the Federal Rules of Evidence.

D. It was not shown by the testimony of FBI Agent Jones, or any other evidence, that the method or circumstances of preparation of these records indicated that they were trustworthy and could be relied upon as required by Rule 803(6) of the Federal Rules of Evidence. It was the theory of the Government's case that the business (Distributor Supply, Inc.) and its records were not trustworthy, and that the exhibits proved the business was a sham without proper records. (Tr. 585, 1108, 1109 and 1110 and also Tr. 21 of hearing on Past Trial Motions, 4/8/76).

The rule has been that even though business records are regularly prepared and kept in the ordinary course of business, they are not admissible under the business records doctrine if they lack the necessary earmarks of reliability and trustworthiness. *United States v. Ware*, 247 F2d 698 (7th Cir. 1957).

This represents a landmark departure from the traditional prerequisite qualification of the business record rule as enunciated first in the common law, then in the Federal Business

Records Act, 28 USC 1732, the Federal Rules of Evidence, Rule 803(6); *Palmer v. Hoffman*, 318 US 109, 87 L.Ed. 645 (1943); *United States v. Rosenstein*, 474 F2d 705 (2nd Cir. 1973); *United States v. Bohle*, 445 F2d 54 (7th Cir. 1971); *United States v. Watkins*, 519 F2d 294 (C.A., D.C. 1974); and *United States v. Ware*, 247 F2d 698 (7th Cir. 1957).

II

Admission of Extra Judicial Admissions and Documents of One Defendant Against the Non-Declaring Defendant Without a Cautionary Instruction Is Reversible Error.

Where extra judicial admissions and documents of one defendant are shown to have been erroneously admitted against a co-defendant, reversal is required as to the non-declaring defendant. See *Blumenthal v. United States*, 332 US 539, where the Supreme Court said at P. 551:

> "If therefore it were shown or even were doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them."
>
> "Even if the evidence were sufficient with the admissions excluded, they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them."

In the case at bar, the only other evidence against the defendant, Jackson, was the testimony of the accomplice Calhoun who the appellate court characterized as "a demonstrated thief, liar and double dealer". Therefore, the evidence of Jones' testimony and the exhibits identified by him and erroneously received into evidence against Jackson did substantially prejudice

the defendant Jackson's right to a fair trial by a jury of his peers giving consideration to properly received evidence and having been properly and legally instructed by the Court. The prejudice to the defendant, Jackson, is manifest. The error is substantial and requires reversal

III

Hardy's Perjury Conviction Should Be Reversed.

The court completely misapprehends the issues concerning defendant, Hardy's conviction under Count V.

Chief Justice Berger writing for the Court in *Bronston v. United States*, 409 U.S. 352, stated "precise questioning is imperative as a predicate for the offense of perjury." This court admits on Page 4 of its unpublished Order:

> ". . . it is true that the question did not make specific reference to Government Exhibit 1 (the fictitious invoice). The prosecutor did in fact show the invoice to Hardy during the Grand Jury proceedings."

As pointed out in the Appellant's Brief, the Grand Jury proceedings regarding defendant, Hardy lasted over an hour and were 68 pages in length. Exhibit 1 was never specifically showed the defendant during this period of time, but was in all the papers that were seized from Hardy by subpoena. How then, can it be said the question that lead to the conviction is precise.

As a matter of fact, as pointed out in the Brief, there was nothing on Exhibit No. 1 that was placed there by the defendant, Hardy that referred to the Cahokia Swimming Pool. Hence, assuming that the invoice was fictitious, by answering the question "no" the defendant was answering truthfully since he had no representation at the time that the invoice was on the Cahokia Swimming Pool job. As a matter of fact, he had leased other pumps to Cunlif Construction Company during this period of time and the check for these amounts was combined.

Therefore, without doubt this Court misapprehends the evidence on Count V and particularly does not follow the directions of the Supreme Court in *Bronston, supra*.

CONCLUSION

Certiorari is warranted here. Each of the elements which this court has traditionally found to warrant the grant of certiorari is present here.

The errors of the court below should not be permitted to stand.

Respectfully submitted,

EDWARD G. MAAG
WALKER & WILLIAMS
Professional Corporation
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Counsel for Petitioner,
Robert D. Jackson

MICHAEL B. CONSTANCE
DONOVAN, HATCH & CONSTANCE
No. 8 East Washington Street
Belleville, Illinois 62220
(618) 235-2020
Counsel for Petitioner,
John Hardy

Appendix

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 30, 1977

(Argued September 15, 1977

Before

Hon. Robert A. Sprecher, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

United States of America, Plaintiff-Appellee, Cross-Appellant, Nos. 76-1815, 76-1816 vs. and 76-1913 John Hardy and Robert D. Jackson, Defendant-Appellants, Cross-Appellees.	Appeal from the United States District Court for the Eastern District of Illinois No. 75 CR 89-E James L. Foreman, Judge.

ORDER

In Count I of a five-count indictment returned on October 30, 1975, Robert D. Jackson was charged with "attempt[ing] to affect commerce by obtaining property of another under color of official right," and John Hardy was charged with willfully aiding and abetting Jackson. Count III of the same indictment charged both defendants with mail fraud, and Count V charged Hardy with making false declarations before the grand jury. On

February 17, 1976, a jury returned verdicts of guilty on all three counts, but the trial court granted the defendants' motion for judgment of acquittal on Count III. Hardy and Jackson now appeal from their convictions on Counts I and V, while the United States appeals from the judgment of acquittal on Count III. For the following reasons, we affirm the district court's judgment in its entirety.

I

We begin with the Government's claim that there was sufficient evidence to establish the necessary elements of mailing (and thus to support a conviction) under the mail fraud count of the indictment. Relying on *Smith v. United States*, 348 U.S. 147 (1954), the district court found that the uncorroborated extrajudicial admission of the defendant Hardy could not alone establish the fact of mailing, which, of course, was an essential element of the crime. On appeal, the Government argues that the court overlooked relevant evidence—specifically, Hardy's testimony that an invoice and check were "sent"—in granting the defendant's motion for judgment of acquittal. We are not persuaded, however, that even when viewed in the light most favorable to the Government, the non-specific testimony of Hardy and Mrs. Dill furnished substantial independent corroborating evidence of the kind required by *Smith*. We therefore do not disturb the lower court's judgment of acquittal on Count III.

II

The defendant-appellants first claim that Count I of the indictment is vague and duplicitous, for it charges Jackson with two offenses: "obtaining property" and "attempt[ing] to receive money." While, admittedly, the indictment could have been more artfully drawn, we agree with the Government that the "attempted to receive money" language is merely descriptive of

the substantive offense, namely, "attempting to affect commerce by obtaining property." Moreover, we find no want of specificity in the indictment, and thus conclude that it satisfactorily informed the defendants of the elements of the charged offense.

Jackson also argues that the trial court failed to adequately instruct the jury on the manner in which it was to consider the extrajudicial statements of Hardy. While acknowledging that the court not only gave general limiting instructions at the close of all the evidence, but also cautioned the jury that Hardy's grand jury testimony was only applicable to Count V, Jackson claims that he was prejudiced by the court's refusal to provide special limiting instructions prior to the testimony of three witnesses, each of whom detailed certain out-of-court admissions made by Hardy. Significantly, however, in none of this testimony was any mention made of Jackson, either by name or by implication. Accordingly, we cannot agree that the admission of this testimony without special limiting instructions was so prejudicial as to warrant reversal.[1]

On a related point, the appellants object to business invoices that were admitted in the course of the testimony above—invoices which, it seems clear, fall within the "business records" exception to the hearsay rule,[2] but which, according to the appellants, were irrelevant and prejudicial. This argument is wholly unpersuasive, however, since the records plainly made more probable the existence of a crucial fact, namely, a fictitious $6,637.08 invoice which, under the Government's theory, was

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[1] Jackson also appears to argue that the testimony on Hardy's out-of-court statements violated his constitutional right of confrontation. This argument has no merit since, quite apart from the fact that no reference was made to him, Jackson had an opportunity to cross-examine Hardy when latter testified at trial.

[2] The records were delivered under subpoena by Hardy. Under the "business records" exception to the hearsay rule, they would be admissible against both Hardy and Jackson.

a "kickback" payment to Hardy and Jackson. We thus find no basis for reversal in the admission of the invoices.

Jackson also argues that because there was no evidence to establish that he was acting "under color of official right," the trial court erred in denying a motion for acquittal on Count I. In this connection, the appellant emphasizes that he was not a member of the Cahokia Public Building Commission, and thus had no authority to award contracts to the Cunliff Construction Company. However, in this Circuit at least, it is clear that

> [t]he use of office to obtain payments is the crux of the statutory requirement of 'under color of official right' . . . so long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.

United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974). And here, the testimony of Robert Calhoun, a government informant and central figure in this affair, indicated that Jackson's presumed authority as mayor was a primary motivation for the attempted payment. Perhaps most importantly, Calhoun testified that he made an agreement with Jackson in the expectation that, as a result, his company would receive additional contracts from the village. When viewed in the light most favorable to the Government, the direct and circumstantial evidence of Calhoun's motivation is a sufficient basis for the conclusion that Jackson acted under color of official right.

We also find a sufficient basis for the jury's conclusion that John Hardy knowingly made a false declaration before the grand jury in violation of 18 U.S.C. § 1623, Hardy appears to argue that Count V of the indictment was improperly founded on an ambiguous (and, perhaps, deceptive) question from the Assistant United States Attorney. But while it is true that the question did not make specific reference to Government Exhibit 1 (the fictitious invoice), the prosecutor did in fact show the invoice to

Hardy during the grand jury proceedings. In this light, we see nothing deceptive or misleading in the question, "Are you aware of any fictitious invoices being delivered to William Cunliff Construction Company on the Cahokia Swimming Pool?"

Finally, we are not persuaded that the Government's failure to furnish the defendants with certain portions of Calhoun's grand jury testimony warrants reversal. On this point, the appellants contend that because the omitted testimony contained statements inconsistent with positions that Calhoun took elsewhere, it would have been invaluable as an impeachment tool. However, there is no reasonable likelihood that this material would have affected the judgment of the jury, since Calhoun—a demonstrated thief, liar and double dealer—was already eminently impeachable.

For these reasons, then, the judgment of the district court is AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 5, 1978

Before

Hon. Robert A. Sprecher, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

United States of America,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 76-1815, 76-1816 and 76-1913 vs.

John Hardy and Robert D. Jackson,
Defendants-Appellants,
Cross-Appellees.

On Petition for Rehearing and Suggestion for Rehearing En Banc

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by Defendants-Appellants, Cross-Appellees John Hardy and Robert D. Jackson, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.